IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-977

HUBBARD BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY

MELVIN H. SIEGEL
LEONARD, STREET AND DEINARD
1200 National City Bank Building
Minneapolis, Minn. 55402

FRANK U. FLETCHER
EDWARD F. KENEHAN
FLETCHER, HEALD, KENEHAN & HILDRETH
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Attorneys for Petitioner Hubbard Broadcasting, Inc.

Washington, D.C. • THIEL PRESS • (202) 638-4521

Petition for Writ of Certiorari filed January 6, 1978.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-977

HUBBARD BROADCASTING, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY

---

1. The Federal Respondents' arguments rest on the mistaken premise that the requirement of equal network facilities, though "erroneous", was "settled" when this court declined to review the court of appeals' 1965 decision. Fed. Resp. Br. 6.[1] But the 1965 decision held only that "compelling public interest reasons must be given for not giving equitable channel treatment to WABC". 345 F.2d at 960. It nowhere considered whether the now unquestioned Congressional purpose in enacting Section

---

[1] The Brief in Opposition of the Federal Respondents is herein stated as "Fed. Resp. Br. _____", that of Respondent American Broadcasting Companies, Inc., "ABC Br. _____", while the Petition is cited as "Pet. _____".

307(b) would be a sufficiently compelling reason if, as the Commission subsequently found in the proceeding under review, (a) the present needs of the Southwest for initial primary service remained essentially unchanged since the Commission's 1958 decision giving Class I-B status to both KOB and WABC and (b) placing all three New York network stations in the same status was not a viable alternative. On these findings, the Commission was thus not foreclosed from concluding (a) that the Congressional mandate warranted granting I-B status to both KOB and WABC, thereby extending an initial primary service to more than 100,000 people in the Southwest without loss of any such primary service elsewhere (Pet. 6-7), and (b) that granting Class I-A status to WABC, while it would give ABC equality of network facilities, would at most add an additional service to the densely populated areas in the East already adequately served at the cost of a substantial loss of needed initial primary service in the "sparsely populated" areas of the Southwest.

At most the court of appeals' 1965 decision required that, if the Commission subsequently found—as it did—that the needs of the Southwest remained substantially unchanged, then the Commission should grant ABC a "hearing" on whether the NBC and CBS stations in New York should also be given the same status (345 F.2d at 960), as the court of appeals had directed in its prior 1960 decision. 280 F.2d at 636. The Commission did give ABC a hearing but rejected this alternative means of equalizing network facilities as involving too high a price in loss of service in the East. App. 99-100. As already noted, however, in so doing the Commission simply reversed the priorities dictated by Congress in enacting Section 307(b). Pet. 13.

Thus, the new requirement of equality of network facilities was not "settled" by the court of appeals until it affirmed the Commission's Order now under review. The issue is thus now squarely presented for the first time whether the avowed Congressional purpose in enacting Section 307(b) to assure adequate service to the "sparsely populated" areas in the Southwest and elsewhere must yield to a requirement of equality in network facilities in the densely populated areas of the East. This is a question of manifest importance, as the Federal Respondents nowhere dispute.[2]

It need only be added that the principal ground asserted in this petition, the compelling legislative history of Section 307(b), was not even mentioned in the Federal Respondents' petition to review the court of appeals' 1965 decision. That petition, which this Court denied, sought only to leave to the Commission's discretion the weight to be given equality of network facilities. It nowhere requested this Court to enforce the mandate of Congress as revealed in the legislative history of Section 307(b).

---

[2] Additional related claims made by the Respondent American Broadcasting Companies, Inc., (ABC Br. 17) hardly rise to the dignity of an argument. The Commission did find that a new Class II-A station had been authorized in New Mexico but would provide a first primary service to only 4,000 persons (App. 103) as compared with the more than 100,000 persons who would receive initial primary service from KOB as a Class I-B station but not as a Class II-A station. The second Class II-A station mentioned by the Commission was KOB itself if it were so reclassified (App. 103-04) but with the stated loss of initial primary service as a Class I-B station. Finally, the Commission did find (App. 103) that seven new FM stations were now located in the area which KOB would serve as a I-B station but not as a II-A station. The Commission, however, did not even mention the number of people thus served—quite possibly because the Commission was well aware, as the record below will show, that any first primary service rendered by the seven new FM stations would be trifling in amount.

2. It may be true that the previously established test for applying Section 307(b) was approved by this Court in *Federal Communications Commission v. Allentown Broadcasting Corporation*, 349 U.S. 361 (1955), as one within the Commission's "discretion", as the Federal Respondents assert. Fed. Resp. Br. 8. But that test was a proper exercise of such discretion because it furthered "Section 307(b)'s emphasis on wide dispersion of radio transmission service". *Pasadena Broadcasting Co. v. Federal Communications Commission*, 555 F.2d 1046, 1050 (D.C. Cir., 1977). The Federal Respondents frankly admit that the Commission has now adopted "another policy". Fed. Resp. Br. 8. This new policy, however, unlawfully defeats the "emphasis" of Section 307(b) by requiring that priority be given to equality of network facilities in major population centers. Pet. 12, 14.

Respectfully submitted,

MELVIN H. SIEGEL
LEONARD, STREET
AND DEINARD
1200 National City
Bank Building
Minneapolis, Minn. 55402

FRANK U. FLETCHER
EDWARD F. KENEHAN
FLETCHER, HEALD, KENEHAN
& HILDRETH
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Attorneys for Petitioner
Hubbard Broadcasting, Inc.